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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 529

LAURA H. JENNINGS, as Executrix of the Last Will and Testament of FREDERIC B. JENNINGS, Deceased,

Petitioner,

vs.

CHARLES W. ANDERSON, Individually and as United States Collector of Internal Revenue for the Third District of New York,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

ROBERT N. MILLER
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J. ROBERT SHERROD
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No.

LAURA H. JENNINGS, as Executrix of the Last Will and Testament of Frederic B. Jennings, Deceased,

Petitioner,

v.

CHARLES W. ANDERSON, Individually and as Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on July 28, 1930 (R. 55) reversing the judgment of the District Court for the Southern District of New York. The District Court had directed a verdict in favor of the plaintiff in the full amount demanded in the complaint after trial by stipulation with a jury of one.

Questions Involved.

The questions involved in this appeal are whether Section 611 of the Revenue Act of 1928, enacted May 29, 1928, is to be interpreted to deprive the petitioner of the right to recover additional Federal income taxes which were collected from petitioner by respondent under duress and

threat of distraint at a time when collection was barred by the Statute of Limitations then in effect, and suit to recover which was brought before the enactment of that Section, and whether if that Section is so interpreted, it violates the Fifth Amendment to the Constitution of the United States in that it deprives the petitioner of property without due process of law.

Statement.

The facts have been stipulated (R. 35). Respondent concedes that the taxes in question were collected from petitioner by respondent under duress and threat of distraint after the Statue of Limitations applicable thereto (Sec. 250 (d) Revenue Act of 1921) had barred collection; that at the time this suit was instituted, petitioner had a clear right to recover the tax so collected under authority of *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346. Respondent concedes further that unless Sections 607 and 611 of the Revenue Act of 1928 be interpreted retroactively to destroy petitioner's right to recover the tax so collected, petitioner must succeed in this suit.

The original action in the District Court involved the years 1918 and 1919. We are concerned only with the year 1918 since the cause of action involving the year 1919 was dismissed by stipulation (R. 29).

Petitioner is the duly appointed and acting Executrix of the Last Will and Testament of Frederic B. Jennings, deceased, hereinafter referred to as the "decedent".

Decedent duly filed his income tax return for the year 1918 on or before March 15, 1919, paying at that time the taxes due according to the return. Decedent died May 26, 1920.

On February 8, 1924, the Commissioner of Internal Revenue made an assessment of additional taxes against the estate of decedent. On February 25, 1924, petitioner filed a claim in abatement which claim was rejected on August 14, 1924.

On July 1, 1925, respondent issued to a Deputy Collector of Internal Revenue for the Third District of New York, a Warrant of Distraint against the property of the decedent for collection of the said additional taxes and interest.

On July 8, 1925, respondent addressed to decedent's estate a notice and demand for the payment of said additional tax and interest thereon under threat of distraint. On July 30, 1925 (more than five years after the filing of the said return by decedent), petitioner paid said additional tax with interest under protest and solely because of duress and threat of distraint by respondent.

On September 19, 1925, petitioner duly filed with respondent claim for refund of said additional tax and interest on the ground that the collection of said sum was barred by the Statute of Limitations.

On May 13, 1926, the Commissioner rejected the claim for refund as to principal; the interest was subsequently refunded.

This action was begun in the District Court on December 6, 1927 and issue was joined in January, 1928. The Revenue Act of 1928 was enacted and took effect on May 29, 1928.

On October 11, 1929, after trial, by stipulation, with a jury of one, the District Court directed a verdict for the petitioner for the full amount demanded in the complaint. The order of the Circuit Court of Appeals for the Second

Circuit reversing the District Court was entered on July 28, 1930.

The Circuit Court of Appeals did not write an opinion (R. 55) but referred to the Opinion in the case of *Reeves* v. *Anderson* which was argued with this case, and which, by stipulation, is filed herewith as part of the Record (R. 56).

Statutes Involved.

"SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

"SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Sec. 607 relating to payments made after the expiration of the period of limitation on assessment and collection."

Reasons for Granting Writ.

(1) The decision below is squarely in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *U. S.* v. *Burden, Smith & Co.*, 33 Fed. (2d) 229. The cases in the District Courts, to quote Judge LEARNED

HAND in the case of *Reeves* v. *Anderson* "are so many and so conflicting that it would serve no purpose merely to enumerate them" (R. 63). He spoke further of "the extraordinary differences in judicial opinion which the situation has evoked—differences which only the Supreme Court can eventually settle, * * *." (R. 58.)

(2) The case involves an important question which has not been and should be settled by this Court. The Government has argued in this and in other cases involving the same question and now pending before this Court that hundreds of millions of dollars in taxes are involved which will be retained by the Government or returned to the taxpayers in accordance with the ultimate determination of this question.

(3) The decision is in conflict with the decision of this Court in case of *Danzer* v. *Gulf Railway Co.*, 268 U. S. 633, in that it revives a statutory liability after the lapse of the period of limitations set up in the statute which created the liability, and therefore results in the taking of property without due process of law.

(4) Unless the writ is granted herein the rights of this petitioner cannot be preserved pending decisions of this Court as to the meaning and validity of Section 611, in other cases now pending in which this Court has granted writs of certiorari.

The Court has granted a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit in the case of *Graham & Foster* v. *Goodcell* (Reported below 35 Fed. (2d) 586). A Writ was granted by this Court on October 20, 1930 in the case of *Reeves, Inc.* v. *Anderson* (October 10, 1930, No. 463). Both of these cases involved the interpretation of Sections 607 and 611. The judgment below in the *Graham & Foster* case, however, treats almost ex-

clusively the meaning of the word "stay" as used in Section 611 and does not discuss the legislative history of that section or its constitutionality. In the *Graham & Foster* case, moreover, the claim in abatement was rejected within five years after the filing of the return, whereas in this case it was rejected after the five-year period had expired.

It is respectfully urged, therefore, that a decision in the *Graham & Foster* case will not necessarily decide all the questions raised in this case. The petitioner, therefore, requests that this case be advanced to be heard with the *Graham & Foster* and *Reeves* v. *Anderson* cases in order that the ultimate decision of the questions involved may be based on a consideration of the entire scope and meaning of Sections 607 and 611.

WHEREFORE, it is respectfully prayed that this petition for Writ of Certiorari reviewing the judgment of the Circuit Court of Appeals for the Second Circuit in the case numbered on its docket No. 329, *Laura H. Jennings, as Executrix of the Last Will and Testament of Frederic B. Jennings, deceased* v. *Charles W. Anderson, individually and as United States Collector of Internal Revenue for the Third District of New York* be granted; that the said decree be reversed, and that this petitioner have such other and further relief as may be right under the law.

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BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

Neither the decision of the United States Circuit Court of Appeals in this case (R. 55) nor the opinion in *Reeves* v. *Anderson*, on the basis of which the decision was rendered (R. 57), has been officially reported.

Jurisdiction.

The decision of the Circuit Court of Appeals for the Second Circuit sought to be reviewed was entered July 28, 1930 (R. 55). Jurisdiction for the issuance of the writ is found in the provisions of Section 240 (*a*) of the Jurisdictional Code as amended by the Act of February 19, 1925 (43 Stat. 938).

Statement of the Case.

It appears unnecessary to repeat the facts stated in the petition. Respondent concedes that the additional taxes for the year 1918 here in question were collected by respondent from petitioner under duress and threat of distraint after collection had been barred by the statute of limitations, and that when this suit was instituted in the District Court petitioner had a clear and undisputed right to recover a judgment against the respondent under the authority of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346; and that this suit was instituted before the enactment of Section 611, of the 1928 Act, on which respondent relies to defeat it.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In reversing the judgment of the District Court in the case at bar.

(2) In failing to hold that Section 611 of the Revenue Act of 1928 did not apply to the case at bar because it did not appear that the collection of the taxes in question was "stayed" by the claim in abatement.

(3) In holding that said Section 611 was retroactive to the extent of depriving the petitioner of the right to recover a judgment which right clearly existed at the time said section was enacted.

(4) In failing to hold that said Section 611, if construed to deprive petitioner of the right to a judgment which clearly existed at the time the wrong was done by the respondent and at the time this case was instituted in the District Court, deprived petitioner of property without due process of law and is in violation of the Fifth Amendment to the Constitution of the United States.

Argument.

The provisions of the statutes involved herein are set forth in the petition; therefore are not repeated here.

(1) The decision of the Second Circuit in this case conflicts with that of the Fifth Circuit in *United States* v. *Burden, Smith & Company,* 33 Fed. (2d) 229.

The hopeless conflict in the District Court cases induced Judge LEARNED HAND to say in *Reeves* v. *Anderson* (R. 63):

> "We have quite deliberately avoided the citation of those decisions which have heretofore dealt with these questions. Those in the District Court are so many and so conflicting that it would serve no purpose merely to enumerate them."

(2) The question at issue is an important one. The respondent stated in his brief below that on this question depend "refunds running into millions" and similar statements have been made by the Government in other cases.

(3) The application by the court below of Section 611 to the instant case was erroneous, first, because there was no "stay" either before or after the rejection of the abatement claim, but rather a mere voluntary delay on the part of the Commissioner in making collection. In using the word "stay" Congress contemplated some act on the part of the taxpayer which would legally or morally tie the hands of the Collector. *United States* v. *Burden, Smith & Company, supra.* No such stay occurred in this case; the Collector merely failed to collect.

The Treasury Regulations are clear on the subject:

> " * * * The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund" (Article 1032, Regulations 45).

The decision of the Court below was erroneous also because even if the Collector's inaction may be regarded as a "stay", there is no evidence in the record that such stay was caused "by the claim in abatement".

The heading of Section 611, "Collection Stayed *by* Claim in Abatement", confirms the common sense conclusion that the section was meant to apply only when the claim in abatement was the active cause of the failure to collect in time.

In the case at bar the claim in abatement was rejected on August 14, 1924, and the tax was not collected until July 30, 1925.

(4) Section 611 is but a subsidiary of Section 607 of the Revenue Act of 1928 and both relate solely to administrative refunds and credits and have nothing to do with recoveries in court. Section 607 was enacted to authorize certain administrative refunds or credits which had previously been forbidden by Section 1106 (*a*) of the Revenue Act of 1926.

Section 607 provides for "credits" and "refunds". The making of credits and refunds is an administrative function of the Commissioner of Internal Revenue, and has been authorized by each succeeding revenue act since the Revenue Act of 1916 in cases of *overpayments of taxes*: Section 14 (*a*) Revenue Act of 1916, 39 Stat. 773. Section 252, Revenue Act of 1918, 40 Stat. 1057. Section 252, Revenue Act of 1921, 42 Stat. 227. Section 281, Revenue Act of 1924, 43 Stat. 339. Section 284, Revenue Act of 1926, 44 Stat. 9. Section 322, Revenue Act of 1928, 45 Stat. 791.

These Sections have been held to have nothing to do with recoveries in the courts, but to relate solely to administrative credits or refunds by the Commissioner of Internal Revenue. *Fox* v. *Edwards*, 287 Fed. 669. *Coffey* v. *Exchange Bank*, 296 Fed. 807.

Section 1106 (*a*) of the Revenue Act of 1926 after providing that the bar of the statute of limitations should not only operate to bar the remedy but also extinguish the liability, provided "but no such credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax." In the case of *Ellay Company* v. *Bowers*, 25 Fed. (2d) 637 (decided by Second Circuit) it was held that this prohibition against credits and refunds applied

to the Commissioner of Internal Revenue only and did not constitute a bar to actions against Collectors. In substituting Sections 607 and 611 for Section 1106 (*a*), Congress did not intend to affect in any way the right to proceed in the Courts.

(5) Sections 607 and 611 do not purport to apply to cases arising prior to the enactment of the Revenue Act of 1928 and may not be given retroactive effect. It will be noted by reference to the sections that their terms are entirely prospective. Section 607 provides that taxes which have been illegally collected after the period of limitations "shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim". Moreover, the section does not bear after its heading the word "Retroactive"—a practice followed in the statute where retroactive effect was intended. (Compare Sections 702 to 706 inclusive of the Revenue Act of 1928.) Where retroactive effect was not clearly intended, such a construction should be avoided. *United States* v. *Magnolia Petroleum Company*, 276 U. S. 160.

(6) If retroactive, Section 611 was intended to apply only to voluntary payments. The Commissioner has recognized that only such payments as are voluntarily made after the effective date of the Revenue Act of 1928, in cases where collections were stayed by abatement claims, come within the provisions of Section 611. See Instructions to Collectors, Mim. 3660, Cumulative Bulletin VII-2, p. 82 (Prentice-Hall (1930), page 19,344), where it is directed:

"COLLECTION NOT TO BE ENFORCED.

"(1) Sections 607 and 611 do not authorize the Bureau to enforce collection of a tax in any case after

the expiration of the period of limitations but merely prescribe the effect of the period of limitations against the United States upon any assessment or payment made after the expiration of the period of limitations applicable thereto. Therefore, no attempt will be made to enforce collection of any outstanding assessment if the period of limitation within which collection can be made has expired, or to make any assessment of any tax if the period of limitation within which the assessment can be made has expired, or to enforce collection of any tax if the assessment was not made within the period of limitation prescribed for the making of the assessment and if no suit for collection without assessment was begun prior to the expiration of such period."

If this distinction between voluntary and involuntary payments is reasonable for the period after the enactment of the 1928 Act, it seems a reasonable distinction before, if that Act is to be given retroactive effect.

(7) If Section 611 was intended to bar actions in the courts it is void as an attempt to take property without due process of law.

(*a*) THE PROTECTION AFFORDED CITIZENS BY THE FIFTH AMENDMENT TO THE CONSTITUTION, AGAINST FEDERAL STATUTES WHICH HAVE THE EFFECT OF TAKING PROPERTY WITHOUT DUE PROCESS OF LAW, INCLUDES PROTECTION AGAINST STATUTES WHICH RE-CREATE, OR REVIVE, LIABILITIES WHICH HAVE BECOME EXTINGUISHED THROUGH LAPSE OF TIME. *Danzer* v. *Gulf and Ship Island R. R. Co.*, 268 U. S. 633, 636. *Davis* v. *Mills*, 194 U. S. 451. *The Harrisburg*, 119 U. S. 199.

In these cases this Court distinguished the earlier case of *Campbell* v. *Holt*, 115 U. S. 620 (to the effect that limitations of the time for asserting common law liabilities might legally be changed or taken away altogether), saying that in *Campbell* v. *Holt* (involving a breach of com-

mon law liability on a contract) the limitation provisions applied "to the remedy only", but pointed out that other types of limitation "operate as a limitation upon *liability.*" The Court cited many cases in which liabilities were created by statute and limitations contained in the same or later statutes were held to bar not only the remedy but the liability itself. In the latter type of limitation, it is held that Congress lacks the power to revive the limitation, and thus revive the liability.

(*b*) THE PROPOSITION THAT THE RUNNING OF THE STATUTE EXTINGUISHED THE LIABILITY FOR THE TAX HAS FORMED A NECESSARY BASIS FOR ALL DECISIONS SUSTAINING THE RIGHT OF CITIZENS TO SUE COLLECTORS OF INTERNAL REVENUE, AND RECOVER SUMS ILLEGALLY EXACTED AS TAXES, AFTER THE STATUTORY PERIODS FOR COLLECTION HAD RUN.

There are no statutes which specifically authorize suits against collectors in cases of this kind. Such actions are brought as common law actions in assumpsit, for moneys had and received, and are personal to the collector, and not against his office. *Smietanka* v. *Indiana Steel Company*, 257 U. S. 1; *Levy* v. *Wardell*, 258 U. S. 542.

Such actions retain their common law basis, notwithstanding the statutory provisions for proceedings before the Commissioner of Internal Revenue required as conditions precedent to suit (Sections 3226 and 3228, Revised Statutes), and those statutes which provide for the conversion of a judgment against a collector to one against the United States, and its repayment. Sections 989 and 3220, Revised Statutes; *Patton* v. *Brady*, 184 U. S. 608; *Sage* v. *United States*, 250 U. S. 33.

The Courts which have construed Section 611 as operating merely to withdraw the *defense* of the statute of

limitations, upon authority of the decision in *Campbell* v. *Holt, supra,* have wholly failed to show how a mere matter of defense can form the basis for an affirmative action in assumpsit. It seems to have been assumed in those cases that actions against collectors in such cases are in themselves founded upon the limitations provisions of the revenue laws. Such is not the case, as these limitations refer solely to the administrative matter of collecting taxes and make no provisions for suits for recoveries of sums collected in violation of such provisions.

(*c*) SECTION 611 WAS NOT INTENDED AS A RATIFICATION OF ILLEGAL COLLECTIONS OF TAXES MADE AFTER THE STATUTORY PERIOD THEREFOR.

This Court has sustained the power of Congress to ratify illegal acts of collectors of public revenues, and to do so even though suits for the recoveries of moneys so illegally collected were pending at the time the ratifying statutes were passed. *United States* v. *Heinszen,* 206 U. S. 370. *Rafferty* v. *Smith, Bell and Company,* 257 U. S. 226.

In these cases, however, there were involved statutes which expressly ratified the illegal collections and were susceptible of no other meaning. In the *Heinszen* case this Court pointed out that, while Congress could ratify illegal collections, "it is not to be presumed to do so on language which, literally taken, has a narrower sense" citing its decisions against implied ratifications in *Lincoln* v. *United States,* 197 U. S. 419 and *De Lima* v. *Bidwell,* 182 U. S. 1.

The power to revive a tax, like the power to ratify, may be exercised only if the rights of private parties have not intervened. *Stockdale* v. *Life Insurance Com-*

pany, 87 U. S. (20 Wall.) 323. But, as has been recognized by this Court, citizens who have suffered wrongful exactions of money by collectors of internal revenue, acting without the scope of their office, do have rights enforcible against said collectors, as individuals. This bars a revival of the tax since such rights of action are property within the meaning of the Fourteenth and Fifth Amendments to the Constitution.

(*d*) IF INTENDED AS A RATIFICATION OF ILLEGAL COLLECTIONS IN CASES WHERE COLLECTION WAS STAYED BY CLAIMS IN ABATEMENT, SECTION 611 OPERATES IN SUCH AN ARBITRARY AND DISCRIMINATORY MANNER AS TO CONSTITUTE CONFISCATION OF PRIVATE PROPERTY.

If Section 611 be a ratification or revival of barred taxes, it is valid or invalid by the same tests which are applied to taxes when laid in the first instance. It is well settled that Congress for all its broad powers to lay taxes must act in that respect so as to produce results conformable to the purposes of taxation, and its enactments which go beyond this and are so arbitrary and discriminatory as to amount to confiscation will not be sustained. *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1; *Nichols* v. *Coolidge*, 274 U. S. 531; *Blodgett* v. *Holden*, 275 U. S. 142.

(1) Section 611 does not authorize the retention of moneys illegally collected where collection was stayed by claims for credit (G. C. M. 6296-Cumulative Bulletin VIII-35-4326).

(2) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the

Revenue Act of 1928. (I. T. 3660—Cumulative Bulletin VII—2, p. 82.)

(3) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(4) Section 611 does not authorize collection to be made from those who stayed collection by claims in abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period therefor.

Section 611 applies only to moneys wrongfully gotten and in the possession of collectors or the Treasury, when the Revenue Act of 1928 was passed, or sums voluntarily paid within one year thereafter, thereby disclosing the true purpose of the Section (as construed by the court below) to be to *confiscate* that which is at hand, not to acquire by taxation that which was formerly due, but which, due to the Government's own mistake of law was not collected in time.

Respectfully submitted,

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